Attachment B to
Joint Applicants' Brief
on Exceptions

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SBC COMMUNICATIONS INC.,	:	
SBC DELAWARE INC.,	:	
AMERITECH CORPORATION,	:	
ILLINOIS BELL TELEPHONE COMPANY	:	
d/b/a AMERITECH ILLINOIS, and	:	
AMERITECH ILLINOIS METRO, INC.	:	
	:	**98-0555**
Joint Application for approval of the	:	
reorganization of Illinois Bell Telephone	:	
Company d/b/a Ameritech Illinois, and the	:	
reorganization of Ameritech Illinois Metro,	:	
Inc. in accordance with Section 7-204 of the	:	
Public Utilities Act and for all other	:	
appropriate relief.	:	

JOINT APPLICANTS' PROPOSED LANGUAGE ON EXCEPTIONS
<u>TO HEARING EXAMINERS' PROPOSED ORDER ON REOPENING</u>

August 16, 1999

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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SBC DELAWARE INC.,	**:**	
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<u>HEARING EXAMINERS' PROPOSED ORDER ON REOPENING</u>

By the Commission:

*   *   *

<u>ACTUAL POTENTIAL COMPETITION</u>

1. An explanation of whether SBC is or is not an "actual potential competitor" in Illinois, as the term has been used throughout this proceeding.

*   *   *

[from page 27]

<u>Commission Analysis and Conclusion</u>

Section 7-204(b)(6) requires the Commission to ascertain that the merger "is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction." We have jurisdiction over four markets -- local exchange, intraMSA toll, interMSA toll, and to a lesser extent, cellular -- to the extent these markets affect intrastate communications in Illinois. Also, we agree with Staff that wireless service is not a clear substitute for wireline service. Therefore, we conclude that the wireline market is the appropriate product market for the Commission's consideration. We find Staff's proposal that Joint Applicants be required to send notice to customers of the divested cellular affiliate before sale of the affiliate to be reasonable. We see no reason why it would delay consummation of the merger.

As for the different markets over which the Commission has jurisdiction, we agree with Staff and Joint Applicants that the merger would not affect the Illinois interMSA market adversely. We agree with Staff that the proposed merger would not impact adversely the number of buyers and sellers of interMSA toll services; the standardization of those services; the ability to enter the interMSA toll market; or the amount of information available to buyers and sellers.

On the key question of whether SBC is an actual potential competitor in Illinois, the Joint Applicants propose that we use the DOJ's merger Guidelines as a framework for our analysis. Staff agrees that it would be reasonable for us to use these Guidelines only as an information tool to guide our analysis of the proposed merger pursuant to the Actual Potential Competition doctrine. In other words, Staff urges that we not strictly apply the standards contained in the Guidelines on this issue, and that we not limit our analysis to the Actual Potential Competition doctrine. We concur with Staff in these respects and will use these Guidelines as a starting point to determine the effect, if any, the merger would have on potential competition pursuant to the Actual Potential Competition doctrine, but we will not give them conclusive effect. Nor do we limit our analysis of the proposed merger's likely effects on competition under the Actual Potential Competition doctrine.

We have several reasons for using the Guidelines as the starting point for our analysis. First, they have been used by the FCC and other state commissions to analyze ILEC mergers. <u>See</u>, <u>e.g.</u>, <u>Bell Atlantic/NYNEX Order</u> at ¶37; <u>California SBC/PacTel Order</u> at 41-42. Second, there is no reason they should not be applied to this merger; indeed, they have been applied to nearly identical mergers. <u>Id</u>. We recognize, however, that the FCC and other state commissions have not applied the Guidelines mechanistically. The California Commission referenced the guidelines but recognized that it was operating under state law. Also, in its recent review of the BA/NYNEX merger, the FCC undertook an analysis quite similar to the analysis recommended by Staff in this proceeding. We will follow the FCC's lead to fulfill our mandatory duties under subsection 7-204(b)(6) to consider all effects that the proposed merger is likely to have on competition.

Accordingly, we will also consider the other two bases which Staff advanced as reasons why the proposed merger is likely to have an adverse effect on competition, i.e., that the proposed merger is likely to inhibit the market's transition to competition and to increase the market's barriers to entry. Not only do we find that Section 7-204(b)(6) requires us to consider these positions; but, these positions were undeniably found to be the means by which mergers of local exchange carriers can have adverse effects on competition by the FCC. Thus, they are suitable areas for our inquiry.

We recognize the general concept that competition only develops when competitive firms are able to enter a market and expand the supply of good that is being provided. In these premises, Ameritech Illinois' dominant market share must be eroded by the entry of competitive carriers and an expansion of their supply of goods. There is, however, no conclusive evidence to show that the proposed merger will inhibit the ability of competitive carriers to enter the market and to increase their supply of the goods.

We also do not believe that the proposed merger will increase the market's barriers to entry preventing competitive carriers from entering or expanding the supply of the goods. It has been argued that the barriers to entry will increase in a number of ways, including increasing the level of disparity between the information held by Ameritech Illinois and CLECs, decreasing the amount of information available to consumers about alternative providers to Ameritech Illinois, and resale and UNE prices, increasing resistance to the implementation of our pro-competitive policies, creating an opening for the adoption of anticompetitive practices within Illinois under the guise of best practices, and increasing the company's incentive and ability to discriminate. This, however, is based only on speculation not evidence. It also fails to account for the fact that Ameritech will continue to be subject to our jurisdiction and to all the dictates of the Act and our rules.

<u>On re-opening, the question of whether the merger satisfies Section 7-204(b)(6) has been reduced to a single outstanding issue: whether SBC is an "actual potential competitor" for local exchange services in Illinois.</u>

<u>As a preliminary matter, we address Staff's argument that the merger is anticompetitive because it enhances Ameritech Illinois' already dominant position and increases the barriers to entry to the Illinois local exchange market. The Commission finds that neither argument provides a basis for concluding that the merger would have a significant adverse effect on competition in any market over which the Commission has jurisdiction. As Joint Applicants have pointed out in prior briefs, and as Staff and Intervenors have conceded, SBC currently has no market share in Illinois local exchange services, thus there is no evidence that the merger would have any effect on Ameritech Illinois' market share. In addition, Ameritech Illinois would still be subject to this Commission's jurisdiction, would still be bound by agreements it entered into and tariffs it filed before the merger, and would still be subject to federal and state laws and regulations regarding the opening of the local exchange markets to competition. Staff has not presented any credible evidence of how the merger would change these facts, or otherwise affect Ameritech Illinois. To the extent Staff's argument is based on the addition of SBC's management, technical, and marketing expertise to that of Ameritech Illinois, these "effects" of the merger, which potentially make Ameritech Illinois a stronger, more effective competitor, are pro-competitive, not anticompetitive. Therefore, the Commission finds that the merger would have no adverse effect on competition in any market over which the Commission has jurisdiction.</u>

<u>On the key question of whether SBC is an actual potential competitor in Illinois,</u>

we agree with Joint Applicants and Staff that it is appropriate for this Commission to be guided by the framework established in the Merger Guidelines for analyzing this question. Under the Merger Guidelines, a showing of an adverse effect from a merger or acquisition on potential competition requires all of the following elements: (1) the merger eliminates a firm that had a high probability of entering the market as a new competitor in the near future; (2) the merger eliminates a firm that is one of only a few firms that are similarly situated to enter the industry in the near future; and (3) the merger eliminates a firm whose entry would have a substantial deconcentrating effect.

Applying the Merger Guidelines to the facts in this case, we conclude that there is no credible evidence in the record that the merger would adversely affect potential competition in Illinois. First, SBC is not a likely potential entrant in Illinois in the near future. SBC does not currently have any business plan to offer local exchange service in Illinois, and key decision-making personnel testified that SBC has no plans to enter Illinois local exchange markets in the near future. As a result, the factors such as SBC's geographic proximity, overall corporate strategy, physical assets, ILEC experience, cellular experience in Illinois, outdated statements of intent or business plans, and CLEC certificate for Illinois are irrelevant. SBC's general capabilities are not enough to make it a potential competitor and are not different from those of many others actual competitors.

Second, the Commission agrees with Joint Applicants that even if SBC were a potential competitor, SBC is not one of only a few potential competitors of Ameritech Illinois. To the contrary, Ameritech Illinois would have at least six major competitors (AT&T, MCI/WorldCom, Sprint, Bell Atlantic, BellSouth, and US West) after the merger. No party presented credible evidence to dispute this fact. This number is sufficient. (1984 U.S. Department of Justice Merger Guidelines, § 4.133, SBC/Am. Ex. 35.) *See also* 5 Philip Areeda & Donald F. Turner, Antitrust Law, § 1123b at 124 (1980). The argument by Staff that certain firms cannot be considered potential entrants because of some current market presence, however small, is not persuasive. The key inquiry is future competitive significance; if AT&T or MCI/WorldCom have the potential to expand their respective market shares in the Illinois local exchange market, then for purposes of our analysis they are both actual competitors and actual potential competitors. *See, e.g.*, *In re Heublein, Inc.*, 96 F.T.C. 385, 590-91 (1980); *In re Champion Spark Plug Co.*, 103 F.T.C. 546, 631 (1984). The fact that they already have a toe hold in the market makes them more significant than other potential competitors, especially firms that are not currently in the market such as SBC, because AT&T and MCI/WorldCom are the most likely to rapidly capture market share from Ameritech Illinois in the near future.

Nor can we dismiss AT&T's recent mergers and its stated desire to develop a cable alternative to telephone service. This is evidence of the creative and expansive ways that telecommunications providers are changing the markets. AT&T's cable service, in the next three to five years, could be developed to provide local exchange service on a large scale. We are not persuaded by Staff's attempts to minimize the significance of this venture.

Third, the Commission finds that the potential entry by SBC would not have a greater competitive effect on Illinois local exchange markets than entry by other firms. There is no evidence that SBC would have more of an impact on the Illinois local exchange market than potential entrants like AT&T, MCI/WorldCom, and Sprint, all of which have significant technical and capital resources, ILEC experience, and national brand names. Even if SBC were to enter the Illinois local exchange market, there is no evidence that it wouldn't do what some other carriers are doing, which is pursue large business customers only, with no impact on the provision of local exchange services to residential and small business customers.

In sum, the Commission finds that the merger would have no significant adverse effect – as that term is used in Section 7-204(b)(6) – on potential competition in Illinois telecommunications markets -- and this finding is particularly strong with regard to the residential and small business local exchange markets in Illinois.

~~Under the Guidelines, a showing of an adverse effect from a merger or acquisition on potential competition is determined through the application of the Actual Potential Competition doctrine. As set out by Staff, the Actual Potential Competition Doctrine requires all of the following elements: (1) the market is concentrated; (2) the acquiring firm plans on entering the market through the acquisition of a dominant firm; (3) the acquiring firm would have likely entered the market either through de novo expansion or a toe-hold acquisition in the near future in the absent the merger; (4) either de novo entry or entry through a toe-hold acquisition by the acquiring firm would have been likely to deconcentrate the market or result in other procompetitive effects; and (5) an insufficient number of similarly situated alternative entrants exists. Staff Brief on Re-Opening at 4. In conducting this analysis, probable entry means entry in the "near future," and not simply at any foreseeable point in time. See, e.g., 79 Op. Cal. Atty. Gen. 301, 1996 Cal. AG LEXIS, at *44-45 (1996). For the purposes of our analysis, we will use a three-to-five year future time period proposed by Staff as the so-called near future.~~

~~Applying the doctrine to the facts in this case, and looking at the first and second elements of the doctrine, we agree with Staff that the evidence establishes a significantly concentrated market for local service. Also, we find that Ameritech Illinois is the dominant provider within the market. Hence, these first and second elements are satisfied.~~

~~Considering the doctrine's third element, we are faced with conflicting positions. Although SBC's executives testified that SBC has no plans to enter Illinois local markets in the near future, there are other factors of record which bear upon the issue and which we are urged to consider. First, there is evidence tending to show that SBC has the incentive to enter Illinois to pursue a national, bundled services strategy. Second, the evidence suggests that SBC has some incentive to enter Illinois to pursue a cellular expansion strategy. Third, we find that SBC has a financial investment in~~

~~OnePoint, which is a CLEC operating in Chicago.~~

~~Overall, it is important to note that the relevant inquiry is whether SBC "would likely" compete with Ameritech Illinois in the near future. See, e.g., FCC BA/NYNEX Order at para. 138 n. 260. We view factors such as SBC's geographic proximity, physical assets, and cellular experience in Illinois as relevant to its "likely" entry. Those factors support Staff's position that SBC would act to increase profits in the absence of acquisition, and that such a desire to increase profits would likely bring SBC to Illinois in perhaps 3-5 years.~~

~~As to the doctrine's fourth element, we find that the impact from SBC's likely independent entry into Illinois' local exchange market would not be significant. When we examine the various parties assertions, they invariably suggest that SBC's entry would be limited in scope and geared to capture large business customers. While even such entry may benefit competitors, it does not benefit, and may even harm small business and residential customers. At the very least, Staff argues, SBC's entry would shake up the market and engender competitive motion which would be a significant impact, in light of the fact that the market has seen little competitive movement since deregulatory efforts began. We note, however, that Staff does not apply the same reasoning with respect to AT&Ts recent local competitive strategy.~~

~~There is no evidence that SBC would have more of an impact on the Illinois local exchange market than potential entrants like AT&T, MCIW, and Sprint, all of which have significant technical and capital resources, ILEC experience, and national brand names. In other words, the same factors which are ascribed to SBC apply to these entities as well. Even if SBC were to enter the Illinois local exchange market, there is no evidence that it would not do what some other carriers are doing, which is to pursue large business customers only, with no impact on the provision of local exchange services to residential and small business customers. This would not amount to significant entry in our view.~~

~~Under the doctrine's fifth element, we must examine whether a sufficient number of alternative likely entrants exists such that the independent entry of SBC is not required.~~

~~As mentioned earlier, SBC is not one of only a few potential competitors of Ameritech Illinois. To the contrary, Ameritech Illinois would have at least six major competitors (AT&T, MCIW, Sprint, Bell Atlantic, BellSouth, and US West) after the merger. This number is sufficient and undisputed. (1984 DOJ Merger Guidelines, § 4.133, SBC/Am. Ex. 35.) The argument that certain firms cannot be considered potential entrants because of some current market presence, however small, is not persuasive. The key inquiry is future competitive significance; if AT&T or MCIW have the "potential" to expand their respective market shares in the Illinois local exchange market, then for purposes of this analysis they are both actual competitors and actual potential competitors. *See, e.g.*, *In re Heublein, Inc.*, 96 F.T.C. 385, 590-91 (1980); *In*~~

~~*re Champion Spark Plug Co.*, 103 F.T.C. 546, 631 (1984). Indeed, the fact that they already have a toe hold in the market makes them, if anything, even more significant then other potential competitors, that are not currently in the market such as SBC. The presence and visibility of AT&T and MCIW make them the most likely to rapidly capture market share from Ameritech Illinois in the near future.~~

~~In the final analysis, while SBC could likely enter the local market in the next three to five years, it is improbable that SBC will be able to single-handedly deconcentrate the market or obtain a significant share of the market anymore than other competitors combination with other entrants.~~

~~It is important to note that the evidence on the issue of whether SBC is an actual potential competitor is such that it allows for more than one reasonable inference. Although we find that the merger meets some of the elements in the doctrine here discussed, we also find that the imposition of the conditions set forth herein mitigates our concerns. As a result of this finding, we will adopt the proposed "conditions" hereinafter set forth as those conditions we deem necessary to our approval. We will require the Joint Applicants to comply with these measures which are both substantial and meaningful and provide long term assurances. We have the authority to impose these conditions pursuant to our power to review the application for the proposed merger and decide whether the Applicants request should be approved under Section 7-204 of the PUA.~~

<u>INTERCONNECTION</u>

2. ***The manner, necessary actions and timetable by which Joint Applicants would provide to CLECs in Illinois services, facilities or interconnection agreements which SBC has made available to CLECs in its other service territories;***

*** * ***

[from page 50]

<u>Commission Analysis and Conclusion</u>

We conclude that Joint Applicants' proposed commitment is responsive to our questions, is sufficiently detailed to satisfy any concerns about its implementation, and is subject to effective enforcement measures. We further conclude that the proposed interconnection commitment will have procompetitive benefits accruing to both CLECs and end-users in Illinois that would not exist absent the merger.

As a starting point, we agree with Joint Applicants that TA96 does not require an incumbent LEC to offer "most favored nation" treatment to CLECs based on interconnection agreements that the incumbent LEC or its affiliate may have in other states. Thus, Joint Applicants' agreement to give CLECs such "most favored nation" treatment with respect to arrangements that SBC has negotiated in other states is a substantial step beyond current legal requirements. It therefore represents a procompetitive benefit to Illinois that would not exist without the merger, because it allows CLECs to opt into a potentially much broader range of arrangements than previously was available. In addition, Joint Applicants have committed to make available in Illinois certain arrangements that they are able to obtain in their role as a CLEC. This, too, goes well beyond any current legal requirement and represents a procompetitive benefit for Illinois that would not otherwise exist.

Certain parties have criticized Joint Applicants' commitment as being vague or illusory. One purpose of the follow-up questions in the June 15 letter was to clarify the commitment and obtain more detail about its implementation. We believe that Joint Applicants have provided the detail we sought, and that the limitations and caveats placed on the commitment are appropriate. Indeed, in many cases the limitations – such as that price terms from other states not be automatically imported to Illinois – are supported by Staff and are necessary to preserve this Commission's role in shaping competitive policy in Illinois. In this regard, we reject any suggestion to require Joint Applicants to import arbitrated terms and conditions from their incumbent BOC agreements. Such provisions, if incorporated into an Illinois agreement, would be deemed "negotiated" provisions and therefore be subject to a lesser degree of scrutiny under TA96. We do not wish to surrender our authority to decide for ourselves whether arbitration decisions in other states comport with our reading of TA96 and applicable Illinois policies, and to establish prices in Illinois based on Illinois-specific costs. It would also be inappropriate to allow arbitrated agreements to be imported into Illinois because some provisions in such arbitrated agreements may be based on network, OSS, policy and legal bases that are unique to those states. ~~We believe one of AT&T's proposals best meets the problems outlined above by SBC and the CLECs. Joint Applicants should provide CLECs in Illinois the same services, facilities or interconnection agreements/arrangements, except as to price, that any SBC ILEC affiliate has voluntarily negotiated, or has been ordered to provide under an arbitration in another state. If SBC believes that a particular provision or agreement is technically unfeasible in Illinois, on contrary to Illinois law or policy, SBC would bear the burden of proof of same. SBC could also request a waiver of any provision or agreement/arrangement or arbitration.~~

Likewise, while there may be future disputes about what arrangements from other SBC states are "technically feasible" in Illinois or whether a CLEC in Illinois is "similarly situated" to the SBC CLEC, that is not a reason to reject or modify the commitment. Technical feasibility is already a limitation on "most favored nation" rights (*see* 47 C.F.R. § 51.809); the only difference now is that Illinois CLECs will have a potentially much broader group of arrangements to choose from in seeking to adopt provisions from other contracts, which benefits the CLECs. That represents a benefit that would not exist without the merger.

Regarding the concern of some parties that Interconnection Commitment D does not include terms and conditions obtained by the SBC CLEC through most-favored nation rights, we agree with Joint Applicants that importation of such terms is not necessary. The theory prompting Interconnection Commitment D is that the SBC CLEC could exercise unique bargaining power to extract unique contract terms from out-of-region incumbent LECs. The exercise of most-favored nation rights requires no bargaining power or special expertise at all; the SBC CLEC would just get the same deal as a prior CLEC. Thus, we will not expand Interconnection Commitment D beyond the specific Commitment made by Joint Applicants.

We believe that the proposed collaborative process among Joint Applicants, Staff, and other parties will help simplify the adoption of terms from out-of-state interconnection agreements and significantly aid us in resolving any disputes that may arise in specific cases. We strongly encourage the parties to work together in this process to resolve disputes short of litigation. We also will seriously consider the proposals that one or more Commissioners participate directly in the collaborative process, though we need not resolve that issue here.

Finally, it should be remembered that these commitments do not affect this Commission's authority over Ameritech Illinois. This Commission will retain its full authority to ensure compliance with each of these commitments and any other provisions of the order approving this merger.

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<u>OPERATIONS SUPPORT SERVICES ("OSS"): IMPLEMENTATION</u>

4. *Implementation timetables regarding integration of Joint Applicants OSS processes.*

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[from page 72]

<u>Commission Analysis and Conclusion</u>

We believe that Joint Applicants have been responsive to our questions. We also find that Joint Applicants' proposed OSS commitment satisfies our concerns and is acceptable in its present form. In particular, we conclude that the OSS commitments will bring a procompetitive benefit to CLECs and end-users in Illinois that would not exist absent the merger.

With regard to the specific timetable for integrating Joint Applicants' OSS systems, Joint Applicants' 3-phase proposal strikes us as a reasonable approach to what will certainly be a complex and expensive process. While some parties may disagree with the degree of complexity, the integration of OSS systems is really an internal decision driven by the parties most knowledgeable about the respective systems. The main purpose of our question was to obtain some firmer idea of what the plans were for integration and to ensure that the integration process would not have an adverse impact on competition in Illinois. We are satisfied that Joint Applicants' proposal will not adversely affect competition in Illinois and is subject to appropriate enforcement mechanisms.

With regard to third-party testing, we agree with Staff witness McClerren that there is no need to appoint a specific entity to perform such testing as part of this case. Beyond that, we also agree with Joint Applicants that no such testing needs to be mandated at this time. Joint Applicants' commitment includes a collaborative process open to all CLECs. We would expect that process to lead to agreement on most or all issues and to include both internal and CLEC testing of the OSS systems. We also note that, while we are willing to serve as arbitrator of disputes arising from the OSS collaborative process (as Staff suggests we should) and will do so if asked, we would prefer to work with regulatory bodies in other states to devise some consolidated process for such disputes covering all states, which would lead to greater uniformity and perhaps faster implementation.

Thus, the Commission finds the Joint Applicants' OSS proposal allows for Staff involvement in the collaborative process as well as very detailed benchmarks which will enable the Commission to closely monitor the Joint Applicants' OSS performance. ~~In the event the Joint Applicants' OSS fail to meet their OSS commitments, they will incur penalties up to $90 million annually.~~ The Commission will also be able to take advantage of the third-party auditing and verification that Joint Applicants have proposed to have included as a condition with the FCC and which Joint Applicants will make available to this State Commission as well as other state commissions. This combination of CLEC collaboration, and Commission oversight~~, and strict penalty enforcement~~ reduces the need for independent third party review. In the event Joint Applicants fail to meet their OSS commitments, the Commission has ample authority and jurisdiction to impose appropriate remedies.

Finally, under Illinois law, the Commission is legally restricted from awarding state contracts for professional services absent a competitive bidding process. *See* 30 ILCS 500/35-30 (West's Supp. 1998). As a result, any third party testing would be subjected to a competitive bidding process.

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SAVINGS

8. ***Provide a total and complete breakdown detailing Joint Applicants' estimates of the costs and savings associated with this merger. Explain the methodology and assumptions used to arrive at the estimates for overall Ameritech savings, Ameritech Illinois savings, and SBC savings. Explain how these savings are spread between the Ameritech states.***

Explain the methodology and assumptions used to arrive at the estimates for overall Ameritech costs, Ameritech Illinois costs, and SBC costs. Explain methodology used to calculate the total estimated costs of this merger, including a breakdown of the component figures which add up to total estimate of costs.

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[from page 84]

Commission Analysis and Conclusion

The issue of the costs and savings associated with the merger, and whether and how much of those savings should be "shared" with ratepayers, is quite complex. Our purpose in asking question 8 was to determine whether more specific cost and savings information was available than had been presented in the proceeding to that time. Joint Applicants have responded to our question with a breakdown of costs and savings that, as they explain, is the most detailed available. Having reviewed the testimony and briefs, we accept Joint Applicants' explanation and must make our decision on the record as it stands. In doing so, we note that no other party has presented more detailed or more definitive information than in the earlier phase of this proceeding, and some have even made proposals based on less precise data and broad estimates.

Having considered the full record, including all of the testimony, evidence, and briefs on reopening, we conclude that a required sharing of savings is not necessary or appropriate in this case. We make this decision in part because it is consistent with the Alternative Regulation Plan and in part because of the significant additional commitments made by Joint Applicants on reopening, which will ensure that the benefits of the merger will flow through to Illinois consumers through improved quality and a variety of services that will benefit resale and wholesale customers and promote additional competition. We note that the PEPO proposed to use a mandated rate reduction sharing mechanism as a means of ensuring compliance with any conditions we impose in this Order. Whether or not that was appropriate at that stage of the proceeding, the numerous commitments made by Joint Applicants on reopening, which include monetary figures for non-compliance, along with the continued existence of all of our traditional statutory enforcement powers, remove any need to use Section 7-204(c) as a compliance mechanism.

[ALTERNATIVE CONCLUSION A, TO BE USED ONLY IF THE COMMISSION FINDS SHARING IS REQUIRED]

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To begin, we agree with the Joint Applicants that the term "savings" in Section 7-204(c)(i) refers to an actual reduction in costs or expenses. Undefined terms in statutes are to be given their "ordinary and popularly understood meaning." Texaco-Cities Pipeline Service Co. v. McGaw, 182 Ill. 2d 262, 270 (1998). The "ordinary and popularly understood meaning" of "savings" is a reduction in costs or expenses. See Funk & Wagnall's New International Dictionary of the English Language: Comprehensive Edition at 1120 (1987) ("save" means "to keep from being spent, expended or lost; avoid the loss or waste of" and "[t]o avoid waste, become economical"); Black's Law Dictionary at 1343 (6th ed. 1990) ("savings" means "economy in outlay; prevention of waste; something laid up or kept from being expended or lost.") Savings does not mean generating more revenue.

Looking to the particulars of Section 7-204(c), the plain language doctrine again leads us to construe "savings" as that term is ordinarily understood, namely, a reduction in costs or expenses. Hence, the urgings of Staff and certain Intervenors that we widen the pool to include "revenue enhancements" are rejected. The mere fact that the parties themselves have consistently drawn a distinction between "expense savings" and "revenue enhancements" reaffirms our belief that "revenue enhancements" is not what the General Assembly intended when speaking of "savings". Courts are not free either to restrict or to enlarge the plain meaning of a unambiguous statute and we also follow this pronouncement. <u>Ehredt v. Forest Hospital Inc.</u> 142 Ill. App. 3d 1009, 492 N.E.2d 532 (1st Dist. 1986).

As for the meaning of "costs", the Commission agrees with Staff that none of the one-time merger costs which relate to the change in ownership of Ameritech, such as banker or brokerage fees, legal fees, or accounting fees, constitute legitimate costs for present purposes. It is only those costs directly associated with AI's provision of service which qualify under Section 7-204(c). Hence, we agree with Staff's position to allow recovery of only those costs directly associated with the utility's operations.

Given the Commission's strong preference for dealing in matters of certainty, we believe that both the savings and the costs of this transaction as well as their reasonableness, must be determined when actual data, as opposed to estimates, are available. We further note the disparity between the result generated by the Dr. Selwyn and the estimate presented by Mr. Gebhardt, as convincing proof of the need to await actual figures. Moreover, with respect to Dr. Selwyn's savings estimate, we believe that the underlying methodology based largely on the purchase premium paid by SBC for Ameritech is not appropriate for the task. Such an analysis necessarily discounts or excludes the fact that in nearly every transaction of this type there is a multitude of factors and motives underlying both the merger decision and the size of the premium. Because the cost savings of the merger are calculations, at best, only one of the factors taken into account, they simply cannot be equated with the total premium.

We fully agree with Staff that the Commission needs to make separate rulings on both savings and costs pursuant to Section 7-204(c) requirements. This we intend to do. However, we are not persuaded by Staff's position opposing the netting of savings and costs. To the extent that costs are incurred to produce savings and are shown to be both reasonable and directly related, we agree with the Joint Applicants that netting is appropriate. As a matter of logic, the only savings that can be experienced are net savings.

Accordingly, although we recognize Joint Applicants' legal position that no flow-through of savings through mandated rate reductions or credits is appropriate in this case and that no such mandated flow-through is necessary because merger benefits will flow to customers in other ways, we conclude that the treatment of merger-related costs and savings in a manner that provides an enforcement mechanism for those conditions which do not themselves contain a specific enforcement mechanism or for which none is available through applicable statutory provisions is appropriate.[1] Joint Applicants will be held responsible for recording all Ameritech Illinois-related savings and all costs relating to the merger, with the ultimate result that between 0% and 25% of the actual net merger savings related to Ameritech Illinois realized in the three years following this Commission's approval, or until this issue is resolved in the context of the Alternative Regulation Plan, whichever is sooner, may be flowed through to ratepayers via rate credits as an enforcement mechanism. The 0% amount will be referred to as the floor. We find this to be appropriate because if Joint Applicants comply with all of the conditions imposed in this Order, which are designed to promote competition and more and better services, consumers will enjoy the benefits of the merger without the need for any enforcement flow-through of savings. To the extent, however, that the Commission finds that the Company has failed to meet one or more of conditions (1) through (28) of this Order set forth below, the Commission may, after considering the significance of the condition(s) to ratepayers and the degree of non-compliance, allocate merger savings from the floor up to an amount not exceeding 25% of the actual net Ameritech Illinois merger savings. This amount will be referred to as the cap. This is an adjustment from the PEPO, which used a 25% floor and 50% cap. We find this adjustment to be both necessary and appropriate in light of the substantial additional commitments made by Joint Applicants

[1] By proposing this conclusion, Joint Applicants are in no way waiving or abandoning their argument that allocation of any savings to ratepayers is not appropriate in this case, and that even if it were the proper allocation would be zero dollars. However, Joint Applicants have offered the draft conclusion for the Commission's consideration in the event it disagrees with Joint Applicants' position.

on reopening, which, in addition to ensuring more benefits to customers and competition, contain some new enforcement mechanisms of their own.

The Commission believes this mechanism to be the best and most effective way to protect the interests of the utility and its customers by ensuring a continuing high quality of service and the enhancement of services which will be achieved through compliance with our conditions. This mechanism is not to be construed as either a penalty or an incentive.

~~Moreover, our reading of Section 7-204(c) indicates that just such a result is contemplated. We further conclude on the arguments presented, that 50% of the net merger savings allocable to AI should be allocated to consumers using Staff's distribution methodology. This strikes a fair balance considering the commitment, performance and benchmark costs which will be incurred post-merger.~~

In keeping with our responsibilities under Section 7-204(c) and based on the evidence of record, we direct the Joint Applicants to follow Staff's Interim Method until the appropriate mechanisms are made in the five-year review of the Plan.

To be specific, Ameritech Illinois is required to track its share of all actual merger-related savings and all merger-related costs, as herein defined, separately for the period beginning on the date that the merger is consummated and ending on March 15, 2000. AI shall submit that information as part of its annual Alt. Reg. filing on April 1, 2000. Furthermore, this information will continue to be provided in Ameritech's annual price cap filings until such time as an updated price cap formula has been developed in Docket 98-0252. In the annual price cap filings, AI is required to flow-through merger savings net of reasonable costs in the manner here described for a period of three years. A period of three years represents a reasonable time frame given the state of competition in Illinois.

It is the ruling of this Commission that the net merger-related savings, if any allocations is ordered as a result of non-compliance, should be allocated to Ameritech Illinois' customers as follows:

(1) Carriers purchasing AI's UNEs, interconnection, and transport and termination services will benefit from merger-related savings through updated rates resulting from modification of its TELRIC, shared and common costs.

(2) Once the share of the merger-related savings allocable to UNEs, interconnection, transport and termination purchasers have been identified, the remaining balance of savings will be allocated to interexchange, wholesale and retail customers. This will be done by dividing the remaining merger-related savings between IXCs on the one hand and end users (whether served via retail or wholesale) on the other,

based on the relative gross revenues of each of these two groups.

As per Staff's recommendations, which we find to be reasonable, IXCs' share of the merger-related savings should be allocated to those customers through reductions in access charges, including the intrastate PICC. End users' share of the merger-related savings should be allocated as a credit on a per network access line basis to ensure that business customers do not receive a larger portion of the merger-related savings than residential customers.

*   *   *

D. Section 7-204(f) Conditions and Enforcement

Section 7-204(f) deals with our authority to place conditions on approval of a reorganization, and states as follows:

> In approving any proposed reorganization pursuant to this Section the Commission may impose such terms, conditions or requirements as, in its judgment, are necessary to protect the interests of the public utility and its customers. (220 ILCS 5/7-204 (f)).

The primary dispute is whether the conditions, that the Commission is authorized to impose, must be related to the findings it is required to make pursuant to Section 7-204(b),

*   *   *

[from page 99]

Commission Analysis and Conclusion

<u>For their part, the Joint Applicants claim that our authority to set conditions in this matter must be defined and circumscribed by the other provisions of Section 7-204. Specifically, they contend that the conditions must be limited to those necessary to make the required findings under Section 7-204(b). Staff and Intervenors, such as AG and CUB, argue that our authority is much broader, allowing us to impose any conditions that reasonably relate to the "public interest." We agree with the Joint Applicants.</u>

<u>Our conclusion is compelled by the rules of statutory construction and constitutional law. First, statutes must be construed as a whole and light of their purpose. The plain purpose of Section 7-204 is to have the Commission review all "reorganizations" and ensure that they satisfy the seven requirements either "as filed" or as a result of conditions we impose to make it satisfy those requirements. In other words, the conditioning authority is a tool by which we can ensure that a reorganization satisfies Section 7-204(b). Thus, Sections 7-204(b) and (f) work together to ensure that</u>

the interests identified in subsection (b) are satisfied before we approve any reorganization.

Second, if we were to read Section 7-204(f) any more broadly, we would go beyond the purpose of the statute and violate another rule of statutory construction – the rule that no provision in a statute should be read so as to render other provisions meaningless or superfluous. If we read Section 7-204(f) as allowing the Commission to impose any conditions on its approval of a merger – even if those conditions had no relationship to Section 7-204(b) – we would turn Section 7-204(b) into a mere starting point in our analysis. Indeed, a proposed merger could satisfy all seven requirements of subsection (b), yet we would be free to impose additional conditions without any limitations. For example, we theoretically could conclude that requiring Ameritech Illinois to paint all of its repair trucks bright orange ore replace them with 1999 Volvos would be a proper condition because it would improve safety and therefore benefit the public. Such a condition, however, would have nothing to do with any effect of the merger or any of the matters addressed in Section 7-204(b). There is no textual basis for reading Section 7-204(b) so broadly; rather, Section 7-204(b) sets out the sole test for our approval of a reorganization and therefore defines the scope of Section 7-204(f).

Third, our reading of Section 7-204(f) is confirmed by the history of Section 7-204 and the 1997 amendments to that section by the General Assembly. Prior to the 1997 amendments, the language relating to the Commission's conditioning authority was the same as it is now. Significantly, this language was not previously included in its own subsection. Instead, it immediately followed the substantive approval requirements for a reorganization, which prior to the amendments were in subsection (e) (the counterpart to subsection 7-204(b) today). With respect to the conditioning language, the only change made by the 1997 amendments was to put an (f) in front of it. Thus, the structure of Section 7-204 as originally enacted reinforces the conclusion that the General Assembly tied the conditioning authority directly to the substantive approval requirements now codified in subsection 7-204(b).

Fourth, reading Section 7-204(f) as allowing us to impose conditions based on a broad "public interest" test would exceed our delegated authority. Any condition we impose is really a sort of limited disapproval, i.e., we have refused to approve the transaction as filed. The only basis for disapproval of a reorganization, however, lies in Section 7-204(b). If we were to read Section 7-204(f) as allowing us to require a greater showing by applicants than is necessary to meet the requirements of Section 7-204(b), we would effectively increase the burden of proof beyond that established by the legislature. Being a creature of statue whose powers are limited to what is delegated from the General Assembly, we have no power to increase the burden of proof in that manner. The power granted to us under Section 7-204(f) simply cannot be read to include an ability to impose conditions on our approval of a merger that are totally unrelated to the statutory standard for approving the merger under Section 7-204(b).

Under the constitutional "non-delegation doctrine," the authority that the legislature grants to an agency must "provide sufficient standards to guide the administrative body in the exercise of its functions" and "define[ ] the terms under which . . . [the agency's] discretion is to be exercised." People v. Tibbitts, 56 Ill.2d 56, 59-62 (1973). Specifically, to satisfy delegation standards under Illinois law, a statute must sufficiently identify "(1) the persons and activities potentially subject to regulation; (2) the harm sought to be prevented; and (3) the general means intended to be available to the administrator to prevent the identified harm. Stofer v. Motor Vehicle Casualty Co., 68 Ill.2d 361, 372 (1977). Section 7-204(f) can meet these standards, but only when read in context with the rest of Section 7-204: the "persons and activities potentially subject to regulation" are identified in Section 7-204(a); the "harm sought to be prevented" is harm to "the interests of the public utility and its customers" as a result of the merger leading to any of the adverse effects listed in Section 7-204(b); and the "general means intended to be available to the administrator to prevent the identified harm" is either disapproval of the reorganization or: "[I]n approving any proposed reorganization," the "impos[ition] [of] . . . terms, conditions or requirements." 220 ILCS 5/7-204(f).

If we were to read Section 7-204(f) as allowing us to impose any conditions on approval of a merger when such conditions were unrelated to the statutory approval standard under Section 7-204(b), we would effectively read out of Section 7-204(f) any "sufficient standards" to guide the exercise of our discretion in imposing conditions. That, of course, would raise constitutional concerns under the non-delegation doctrine. Modern cases under the non-delegation doctrine (and basic rules of statutory construction), hold that we must interpret statutes in a manner that avoids such constitutional problems. East St. Louis Federation of Teachers v. East St. Louis School Dist., 189 Financial Oversight Panel, 178 211.2d 374, 425 (1997); Stofer, 68 711.2d at 890; Illinois Bell Tel. Co. v. Ames, 364 Ill. 362, 365-66 (1936). We achieve that here by reading Section 7-204(f) in light of the purpose and structure of Section 7-204 as a whole, and therefore as allowing us to impose only such conditions as are necessary to make the requisite findings under Section 7-204(b). See Stofer, 68 711.2d at 880 (adopting similar approach to avoid non-delegation problems).

Fifth, we find that reading Section 7-204(f) in the manner suggested by the AG and CUB would be poor regulatory policy. Section 7-204(b) already encompasses all of the relevant "interests" of a utility and its customers in a reorganization case, and there is no need to interpret Section 7-204(f) as allowing us to impose conditions based on some other, undefined interests.

For these reasons, we conclude that Section 7-204(f) authorizes us to impose conditions on our approval of a merger only to the extent such conditions are necessary to allow us to find that the merger satisfies the elements of Section 7-204(b). This is the most defensible and consistent reading of the statute as a whole and avoids constitutional problems that otherwise might arise if we attempted to read Section 7-204(f) in a way that exceeds our delegated statutory authority.

We wish to emphasize that this conclusion applies to conditions that are involuntarily imposed on parties to a reorganization, as opposed to conditions to which the parties voluntarily agree. Agreed-to conditions may be made requirements of our Order, but that does not necessarily mean they are necessary under Section 7-204(f). Rather, such conditions may be adopted based on the petitioners' commitments without our having to find they are required for the reorganization to satisfy Section 7-204(b).

~~Staff and other Intervenors urge us to impose conditions on the approval of the merger, and each of them has set out a number of different proposals. The Joint Applicants, on the other hand, argue that no conditions are warranted in this situation.~~

~~Section 7-204(f) specifically provides that in approving a proposed reorganization, the Commission may "impose such terms, conditions or requirements as, in its judgment, are necessary to protect the interests of the public utility and its customers." Our authority to impose conditions is simply beyond question. There is, however, some disagreement among the parties as to the type of conditions that we are empowered to impose.~~

~~For their part, the Joint Applicants claim that our authority to set conditions in this matter must be defined and circumscribed by the other provisions of Section 7-204. Specifically, they contend that the conditions must be limited to those necessary to make the required findings under Section 7-204 (b). Staff and Intervenors, such as the AG and CUB, argue that our authority is much broader, allowing us to impose any conditions that reasonably relate to the "public Interest". We find each of these positions to be somewhat lacking.~~

~~In our examination of Section 7-204(b), we find that the first sentence flatly states that "no reorganization shall take place without prior Commission approval." This provision grants jurisdiction to the Commission over the proposed reorganization. The paragraph continues with the requirement that a "hearing" be conducted pursuant to proper notice. (Id.). This Part envisions the creation of a tested evidentiary record. In the remaining portions of subsection (b) we are both restrained from approving a reorganization that "will adversely affect the utility's ability to perform its duties under this Act," and informed of seven specific findings that we "must" make in the course of its review. (Id.).~~

~~In all of Section 7-204(b) there is no language or other expression from the General Assembly, however, which limits the Commission from making additional findings if they are supported by the record. On this basis, we view the findings that we are specifically required to make under Section 7-204(b) to be the minimum findings. We believe as a matter of both law and common sense that additional findings certainly can and will be made in Section 7-204 proceedings. It is these additional findings which, being based on evidence, constitute a reasonable and rational source for the establishment of conditions. We further note that these findings may or may not relate~~

~~directly to the specific findings that we are statutorily required to make.~~

~~A common sense reading of the entirety of Section 7-204 indicates to us that while the legislature outlined the most obvious interests needing protection in subsection (b), it could not anticipate all of what the evidence would show in any particular proceeding. We view the conditioning authority granted us under Section 7-204(f) as a means to address and protect the utility and its customers in ways not envisioned in subsection (b) but made apparent in the course of the proceeding.~~

~~Turning again to the statutory language of Section 7-204(f) as the best indicator of legislative intent, the Commission finds that the only limitation put upon our discretion is that the conditions we attach be, in our good and informed judgment, of a type necessary to protect the interests of the company and of its customers. We believe, that it is the evidence of record in the proceeding, conducted pursuant to Section 7-204(b), which particularly informs our judgment and sets out the scope of our discretionary authority.~~

~~Having set out our construction of Section 7-204(f) we now proceed to detail the conditions we find necessary to impose in the instant proceeding. Consistent with our analysis above, each of these conditions has a basis in the record of this proceeding and is determined to be necessary to protect the interest of the public utility and its customers.~~

* * *

VI. Conditions to Approval of the Reorganization

J. Conditions To the Approval of the Proposed Reorganization.

* * *

[from page 135]

(12) LRSIC & TELRIC - AI will file revised LRSIC, TELRIC and shared and common cost studies within six months after the last regulatory approval of the proposed reorganization. It is noted that Staff is willing to work with AI to establish a priorities list for such updates. The Commission will utilize the updated studies in its analysis of the Company's request for rate rebalancing and in its ~~the two~~ TELRIC investigation~~s~~;

(13) Cellular Notification - The Joint Applicants will provide the requisite notice to affected cellular customers regarding the pending merger and sale of the cellular property. ~~in compliance with Staff's recommendation~~. They also should afford the purchaser the opportunity to participate in the specifics of such notice;

(14) 9-1-1 Service - The Commission requires that, if the post-merged company

combines the two 9-1-1 operations and organizations, AI must seek Commission approval of the plan and establish that the 9-1-1 changes will be transparent and not impact the integrity of Illinois 9-1-1 system. ~~Additionally, AI must seek Commission approval for the removal of any AI 9-1-1 Staff and establish that any remaining 9-1-1 Staff will have executive management authority.~~

* * *
[from page 136]

(23) OOS ~~OSS~~ - We require Joint Applicants to correct the OOS-24 hours performance as hereinafter set forth.

While a non-compliance penalty structure was outlined in the Plan and has been enforced continuously, obviously, this punitive measure has not provided a sufficient incentive for AI to cure the problem.

It is an express condition to our approval that within no more than 90 days from the final regulatory approval, AI will provide the Commission and Staff with a written commitment and plan detailing the steps it will undertake to remedy the problem together with a time line that includes a date certain for completion;

(24) Concurrent with this Order, we are issuing a Rule To Show Cause Order in Docket No. 98-0252 requiring AI to respond and show cause why the penalty formula found in its Alternative Regulation Plan should not be increased consistent with the recommendations set out in Staff Ex. 8.01 at 16;

~~We are in agreement with Staff that re-litigating the issue of proper penalties as they relate to OOS>24, would constitute an unnecessary drain on the Commission's time and resources. As a result, Staff's proposed penalty should be increased by amending the Alt. Reg. Formula "Q" component a set forth in Staff's Initial Brief at 106; (as outlined in its Initial Brief at 105-108) will be adopted *in toto*.~~

[In the alternative should the Commission insist on having a graduated penalty]

(24) Within 90 days of the meger closing, the Company shall amend the Alternative Regulation formula currently in place in such a manner that the "Q" component for out-of-service over 24 hours will be $8 million for any missed minimum service requirement occurring during any calendar year after the merger closing. Additionally, in the event the Company misses the same minimum service requirement two consecutive years, the "Q" for that item will be doubled for the second year (*e.g.*, a Q factor of $4 million would be increased to $8 million). If the Company misses the same minimum service requirement three consecutive years, the "Q" for that item will be doubled again (*e.g.*, a Q factor of $8 million would be increased to $16 million). At such time as the Alternative Regulation

Plan is revisited, new Q factors will be set based on AI's experience over the course of the existing plan.

(25)~~(24)~~ Rate Cap - Basic residential services ~~Residential and other basic services~~ will be capped at current rates through to July 1, 2002. AI may, however, propose increases or decreases, as necessary, subject to Commission review and approval;

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[from page 138]

(29)~~(28)~~ Recordation of All Savings and Costs - The Joint Applicants will be held responsible for recording all Ameritech Illinois-related savings and all costs relating to the merger in the manner described herein with the ultimate result that between 0% and 25% of the actual net Ameritech Illinois-related merger savings realized in the three years following this Commission's approval, or until this issue is resolved in the context of the Alternative Regulation Plan, whichever is sooner, may be flowed through to ratepayers via rate credits as an enforcement mechanism. The 0% amount will be referred to as the floor. We find this to be appropriate because if Joint Applicants comply with all of the conditions imposed in this Order, which are designed to promote competition and more and better services, consumers will enjoy the benefits of the merger without the need for any forced flow-through of savings. To the extent, however, that the Commission finds that the Company has failed to meet one or more of conditions (1) through (28) of this Order set forth above, the Commission may, after considering the significance of the condition(s) to ratepayers and the degree of non-compliance, allocate merger savings from the floor up to an amount not exceeding 25% of the actual net merger savings. This amount will be referred to as the cap.

The Commission perceives this mechanism to be the best and most effective way to protect the interests of the utility and its customers by ensuring a continuing high quality of service and the enhancement of services which will be achieved through compliance with our conditions. This mechanism is not to be construed as either a penalty or an incentive. ~~50% of the net merger savings be allocated to consumers as previously set forth in this Order.~~ We note that his measure puts the burden on the Joint Applicants to affirmatively evidence compliance in all particulars regarding the recordation of all savings and all costs thus conserving Staff's time and resources.

(29) Interconnection - Ameritech Illinois will provide interconnection in accordance with the following interconnection commitments:

Interconnection Condition A

A. Ameritech Illinois shall provide to CLECs in Illinois those services, facilities or interconnection agreements/arrangements voluntarily offered by SBC in its in-region states subject to the following exceptions and conditions:

- Ameritech Illinois shall not be required to offer to CLECs in Illinois UNEs, services, facilities or interconnection agreements/arrangements which have been imposed upon SBC by another state as a result of an arbitration (as opposed to a voluntary agreement);

- Ameritech Illinois shall be required to offer to CLECs in Illinois UNEs, services, facilities or interconnection agreements/arrangements, unless it demonstrates by a preponderance of the evidence that they are technically infeasible or unlawful or contrary to state policy;

- ~~Ameritech Illinois may request a waiver of any provision of an agreement/arrangement or arbitration~~;

* * *

VII. Findings and Ordering Paragraphs

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[from page 152]

(7) In order to provide the Commission with further assurances that the proposed reorganization satisfies the requirements of Section 7-204, Joint Applicants have made a number of voluntary commitments in this Reopening Proceeding. These commitments are adopted by the Commission as conditions to its approval of the proposed reorganization. We hereby incorporate all of the numbered paragraphs and conditions of Section VI as part of this Finding (7).

(8) Section 7-204(f) permits the Commission to impose conditions only if those conditions are necessary to enable the Commission to make the findings required by Sections 7-204(b)(1) through 7-204(b)(7); although the Commission concludes that no conditions are necessary to make the findings required by Section 7-204(b) of the PUA, Joint Applicants should be held to their commitments and the resulting conditions imposed in Finding (7) above;

~~(7) each of the conditions set forth herein is necessary to satisfy the requirements of Section 7-204;~~

(8) ~~the provisions of Section 7-204(c) are being applied to the reorganization,~~

~~so that 50% of the net merger-related savings as previously defined herein, allocable to Illinois, and to be allocated to the merged company's customers in accordance with the determination set forth in the prefatory portion of this Order;~~

(9) if the Joint Applicants do not comply with the conditions set forth herein regarding the implementation of 79 of the 122 benchmark measurements, the Commission may impose an assessment of $30 million as described above. If the Joint Applicants do not fulfill their obligations to comply with the performance measurements, the Commission may ~~will~~ enforce assessments consistent with the liquidated damage remedies ~~impose the maximum penalty provided by law,~~ with a ~~penalty~~ cap of $90 million annually as set forth in Attachment 2 to this Order;

* * *